

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-6219

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MARSHALL P. SAFIR,

Plaintiff-Appellant,

-against-

ROBERT J. BLACKWELL, Assistant Secretary
for Maritime Affairs, United States
Department of Commerce, et al,

Defendants-Appellees.

and

UNITED STATES OF AMERICA, ex rel. MARSHALL P. SAFIR
and MARSHALL P. SAFIR,

Plaintiffs-Appellants,

and

AMERICAN EXPORT LINES, INC., et al,

Defendants-Appellees.

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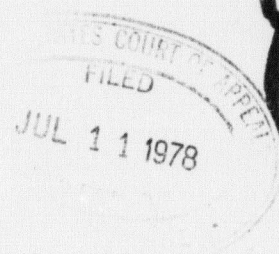
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING IN BANC

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Brooklyn, New York
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Docket No.
77-6219

77-7626



PETITION

In accordance with Rule 40 of the Federal Rules of Appellate Procedure petitioner moves this Court for a rehearing of his appeals in Dockets 77-6219 and 77-7626. Further, petitioner suggests that in accordance with Rule 35 (b) of FRAP a hearing in banc is appropriate in this case for reasons set forth below.

On June 27, 1978 a decision was filed by a panel of this court which denied this petitioner the right to amend a complaint filed in the E.D.N.Y. in 1968 for the purpose of the assessment of additional damages under the False Claims Act 31 USC 231, 232 to a violation proven in 1973 by the Maritime Subsidy Board and affirmed by the Secretary of Commerce in 1974 of Section 810 of the Merchant Marine Act of 1936 (46 U.S.C, 1227.)

Judge Friendly who wrote the first opinion of this Court in 1969 *Safir v Gibson* 417 F2d 972 (*Safir I*) wrote the most recent opinion which will be designated here as *Safir V*, In essence petitioner believes a rehearing is merited for the following reasons:

I

11 The criteria of Rule 35 (a) (1) is met because the concern for the victim of predation which was the linch pin of the decision in *Safir I* has been repudiated in *Safir V*.

Consideration by the full Court is necessary to secure and maintain the uniformity of its decisions.

This Court in Safir I evidenced concern over Congressional intent regarding the position of the victim. Each succeeding decision has drained vitality from this basic objective until the slippage culminating in Safir V has nullified both Congressional intent and the very integrity of Safir I itself.

The following quotations are from Safir I and petitioner submits that the false claims amendment lurked behind every line :

(1) "The primary concern manifested was with the added burden which subsidies impose on the competitive position of the victim. We think this concern also extends to the interest of a former victim in the recovery of subsidies improperly paid in the past. . .

(2) "Recovery of such payment imposes an added cost on the violators and thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him."

(3) We find that section 810 is defined to promote the competitive interest of a victim . . .plaintiff Safir, stated in an affidavit that he desired to return to the shipping business as soon as possible.

(4) "The grant to private citizens of a remedy that would not exist in the absence of specific authorization in no way precludes the availability and further relief consistent with the statutory scheme." Even if the victim is successful in a treble damage suit against the violators, his recovery does not correct the evil at which S810 was aimed, namely, that public moneys have been used to assist some citizens to hurt others in a manner inimical to the interest of the United States."

Now that every claim petitioner made 10 years ago has been proven only this court in banc is in a position to determine how its own mandate in Safir I can be implemented for the victim other than by the amendments sought here under Rule 15(c) FRCP.

The Court of Appeals for the District of Columbia Circuit in *Safir v Kreps* 551F2d 447 (*Safir I*) indicated that an amended complaint by this petitioner under 31 USC 231,232 would be filed when they affirmed his standing to sue stating

"of particular importance here is the decision in *Simon v Eastern Kentucky Welfare Rights Organization* 426US 26 (1976) in which the court added the requirement that 'the plaintiff who seeks to invoke judicial power stand to profit in some personal interest (if he wins the suit)' "

Chief Judge Wright in interpreting *Safir I* reiterates the competitive interest of a victim, particularly this petitioner, and states that "it is enough if Congress thought a victim would profit through recovery of illegally paid subsidies and consequently failure of the Maritime Administrator to extend the intended benefit to a victim is injury in fact. Again however *Safir* must continue to be a potential competitor of the shipping lines which illegally took the subsidies if he is to benefit from a decision to recover such subsidies.¹

When this and other quotations from pages of Judge Wright's decision (see attachment B hereto) are placed in juxtaposition with the last paragraph of Judge Friendly's opinion in *Safir V* (attachment A hereto) at page 3674) either Judge Wright misapprehended *Safir I* or the Second Circuit has departed here from the uniformity of its decisions that it strives to maintain. (Att. C)

II

There is a misapprehension of the case US v Templeton 199F - Supp 179,183, 184 ED Tenn. cited as authority for

¹ See ATT. B Page 8a.

denying "relating back" under Rule 15(c) of FRCP by Judge Dooling which was erroneously accepted at face value by the panel in *Safir V.*

This Court in *Safir V* could find no sound basis for disagreeing with the analysis of Judge Dooling and does not address any of the arguments of this petitioner which pointed out that Judge Dooling was just plain wrong on the facts and the law as set forth by Judge Wilson in "*Templeton*."

Contrary to the opinion of the Court below, the False Claims Amendment arises out of the matter of the original complaint because once the violation of Sec 810 was *res judicata*, all vouchers submitted for subsidies during the offending period were false. A ham and egg relationship is unavoidable.

The original complaint contended that the payments were illegal and in applying for both operating and construction differential, subsidies under 46 USC Sec. 1171, AGAFBO members falsely represented to the government that they were not parties to any agreement in violation of Sec 810 of the MMA, thereby making them ineligible to receive said subsidies. The False Claims amendment for additional damages is not "new matter," or a "new demand," or a "new claim," or a "new count."

The case of U.S v. Templeton, 190 F Supp. at 183, addresses the issue raised by Judge Dooling in this regard as stated therein by Judge Wilson, "...the rule to be followed in Federal Courts is if there is an identity between the amendment and the original complaint with regard to the general wrong suffered and with regard to the general conduct causing such wrong, then the amendment shall relate back and the statute of limitations would not avail to preclude a hearing on the merits."

Applying this rule to the case at hand, the issue is not who the original defendant was (in this case the Secretary of Commerce,) but what he was being asked to do to correct the wrong suffered. The wrong suffered in this case was, in the words of Judge Friendly, "that public monies have been used to

assist some citizens to hurt others in a manner inimicable to the interests of the United States" Safir I, 417 2d 972 et seq. footnote 8. Further in applying this rule the primary issue here is not the identity of the persons named as defendants at the outset, but the general conduct that caused the wrong - in this case the election of the carriers;

"To continue as a party to or to conform to any agreement with another carrier or carriers by water or to engage in any practice in concert with another carrier or carriers by water which is unjustly discriminatory or unfair to any other citizen of the United Statew, etc..."

There is no transformation of the original complaint by adding that the illegal payments of subsidy were false, fictitious or fraudulent and subject to double damages. The payments were illegal because the competitive conduct of the recipients was illegal and because Sapphire Steamship Lines met the criteria set forth in the law to define the injured carrier. (See Safi I supra, footnote 6)

"The district court thought that withdrawal of the subsidies was unrelated to the competitive interest of the injured line since other innocent lines could at once be admitt4d to the routes and subsidized. Apart from the question whether any such lines are waiting in the wings. Congress felt that subsidy payments to violators did affect the competitive position of the victim and we see no reason why we should or could reject that conclusion."

The vouchers submitted for these payments were false because the carriers held out that they had complied with the provisions of Sec 810 when they had not.

So that the violation of Sec. 810 and the false billing that was its consequence both arose out of the same conduct, transaction or occurrence.

"In essence the amendment seeks only an amplification of the damages claimed to have arisen out of the conduct complained of in the original pleadings. The general rule in this regard is that an amendment increasing the amount of damages claimed or merely varying the prayer for relief does not state a new cause of action and may be allowed after the statute of limitations has run.

34 American Jurisprudence Limitation of Actions, Sec 265." U.S. V. Templeton supra at 184. Also see Foman v. Davis 371 U.S. 178; Vann v. U.S. 420 F. 2d 968 (CTCL 1970); J. L. Simmons Co. Inc. V.U.S 412 F. 2d 1360 (CTCL 1969); Tabacaleri Cubana v. Faber C. & Gregg Inc. 379 F. Supp. 772 (SDNY 1974; Aluminum Co. of America v. Admiral Merchants Motor Freight Inc. 16 F.R.Serv. 2d 395, 337 F. Supp. 674, 683 (DCND, Ill. 1972;) Applied Data Processing Inc. v. Burroughs Corp. 17 F.R. Serv. 2d 1097, 58 F.R.D. 149 (DCD Conn. (1977.)) Also see Williams v. United States 405 F2D 234, 236, 238. Travellers Insurance v. Brown 338 F2D 235, 5th Circuit (1973.) Staren v. American National Bank & Trust Co. of Chicago 529 F.2d 1257 (CA 7th 1976m)

The opinion of Judge Wilson in U.S. v. Templeton, supra, is the antithesis of Judge Dooling's holding in regard to "relating back." Both the period during which the wrong took place is the same and the deceitful conduct of misrepresentation was integral to the illegal acts themselves. The amounts of subsidy recovery and the method of compilation are unchanged except for the doubling of the damages.

The position of the parties here parallels the second count in the amended complaint in the "Templeton" case. In the first count of "Templeton" the court held that there was a diversity between the original complaint and the amendment because the original complaint concerned 21 loans on 22 bales of cotton, while the amended complaint is based on improper loans on 524 bales of cotton. Thus the only identity between the first count and the original complaint is the extent to which the 22 bales were included in the 524 bales and these 22 bales were the specific subject of the second count of the amendment.

When the defendant was placed on notice that he was charged with wrongful action relating to 22 bales of cotton he couldnot be charged with being placed on notice when he might be called up eight years later to defend himself from claims of wrongful action relating to 502 other bales of cotton.

The Court has misconstrued the "Templeton" decision by citing the diversity of the wrong suffered in first count of the "Templeton" complaint instead of the wrong suffered and the conduct causing such wrong in the second count.

It is the second count which parallels the circumstances in the instant appeal not the first count. The adequacy of notice on the second count was evidenced in the fact of the twenty-two bales of cotton which was the subject of the original complaint were the same twenty-two bales which were the subject of the second count of the amended complaint. In the instant appeal appellant's demand is for the same relief as in the original complaint. The recovery of all subsidies, both construction and operating differential subsidies, paid to the named violators in the original complaint save for the doubling of damages..

Indeed there was every sound basis for disagreeing with Judge Doolings analysis. When the Court finds that putting the agency to the expense of such investigation is an estoppel of the right of the United States and Marshall Safir to recovery under the False Claims Act under Rule 15C relating back directly to the original conduct charged to be illegal by the named offenders in the original complaint, it convolutes Safir #1 in its Brandeisian concept to act instead as a bar to the philosophy of reentry and also the recovery of false claims for the United States (contrast Foman v Davis 371 U.S. 178 and U.S. v Neifert/White 390 U.S. 228 (1968)).

III

There are factual errors in the opinion of the Court which if uncorrected would prejudice this petitioner in the related actions in the District of Columbia Circuit and in a petition for certiorari (if required) in the Supreme Court.

1: Certiorari was never denied in Safir vs Gibson 417 F 2d 972 as a petition was not filed at that time.

2: Certiorari was denied in Safir v Gibson 432 f 2d 137 and is cited as 400 U.S. 850.

Justice Douglas was of the opinion that cert should have been granted at that time.

#3 A cross-petition sub. nom American Export Isbrandtsen Lines et.al. vs Gibson was filed to overturn the collateral estoppel effect of the FMC decision on the violation of Section 810 and this was denied in a separate discrete action six weeks later with no dissent. This is the citation known as 400 U. S. 942. Hence the violation of Section 810 was res judicata against all members of the AGAFBO Conference subject only to the factual determination that Sapphire met the criteria of an unsubsidized American Flag common carrier. These facts were affirmed by the MSB in 1973 and the Secretary of Commerce in 1974.

#4: Contrary to the slip opinion, there was no 1973 petition for cert. filed in Safir vs Blackwell 469 f 2d 1061, the action in which 31 USC 231, 232 was raised and no Court has yet addressed the collateral estoppel effect of Section 810 on the False Claims Act in this case.

#5: The citation cert denied 414 U.S. 975 (1973) pertains to a petition from denial of a "motion" to set aside the discretionary mitigation of recoveries by the MSB which this Court denied without opinion the following year and not from Safir III.

#6: The Government defendants as well as the steamship lines opposed the motion for leave to amend (see page 3670 of slip opinion). The Governments defendants were not prosecutors or adjudicators of this action nor did the mandate of Safir I ever cast the Maritime Administrator in those roles. As indicated from the first line of Judge Friendly's opinion, this petitioner was in effect the prosecutor to obtain the recovery for the United States and not the reluctant Department of Commerce, as stated by Judge Wright in Safir V Kreps supra.

"No statutory provision has been called to our attention which would authorize the Secretary, Administrator or Board

to adjudicate what Judge Friendly characterized as a contract dispute"

#7: The expensive and time-consuming course which this Court permitted through footnote #2 of Judge Friendly's opinion in *Safir I* supra. to determine whether Section 810 was violated (and after this Court had already decided the collateral estoppel effect of the FMC decision on Section 810) was never designed to be a prosecution by the agency but a fact finding to determine whether all members of AGAFBO were in violation of the law.

Both the decision of Judge Dooling and the opinion of this Court in *Safir V* by avoidance of the term

"collateral estoppel" would rekindle a defense for the non-trade violators were the decision in American Export Isbrandtsen Lines Inc. et al. v Gibsen ^{to} supra, be forgotten. The facts of the matter are that the Secretary of Commerce affirmed the MSB that all eight carriers both "trade" and "non-trade" had violated the Act.. Relitigation based on rate issues in attempts to exonerate the "non-trades" cannot survive the finding that was made in 1973 and 1974. While the violation may have had its genesis in 1967 in the FMC, the hard fact of the matter is that the violation is res judicata against all the lines and the Court should not substitute its judgement for that of the agency. (Citizens to preserve Overton Park, Inc. et al. V. Volpe 401 U S 402, 416.)

IV

The "new evidence alleged by petitioner" (see footnote 5 slip opinion page 3672) is germane to an understanding of the timing of both the False Claims Act Amendment and to his 1977 complaint in Docket 77C 1093 EDNY. Annex A to Judge Dooling's order set forth relevant portions of a deposition by this petitioner citing evidence

of corruption on the part of former President Richard Nixon in accepting a \$7,000,000. (seven million) fund negotiated by one, Spyros Skouras, then president of one of the "non-trade" ship lines to arrange upon his election a minimal settlement of the Sapphire Steamship Lines Inc. anti-trust case and to frustrate this petitioners actions for subsidy recovery for the United States. This was to be done through all means, not excluding judicial influence, administrative harassment and attrition. This deal is alleged to have been made in 1968 prior to his taking the oath of office. One of the conditions alleged to be precedent was Nixon's agreement to name Skouras's Greek American friend Spiro Agnew as his running mate. The \$7,000,000.00 fund, upon information and belief, went first to a settlement of \$2,400,000.00 for the Anti-Trust Case (see Sapphire Steamship Lines Inc. v Winthrop, Stimson, Putnam & Roberts, 509 F.2d 1242,43,44) The remainder of \$4,600,000.00 and its whereabouts was the subject of request for subpoena from Judge Dooling which was denied upon dismissal of the case.

To this date, there has been no refutation of these charges nor have they been denied. Instead counsel for the violators use words like, "fanciful" "incredible", and "unsubstantiated". In spite of the fact that the law officers of the government and the Courts to date have eschewed action to determine the truth or falsity of the new evidence and in spite of the fact that the panel in Safir V considers petitioners' effort in behalf of the government and himself as "valiant" they would ignore ANNEX A and still consider this entire ten-year saga as not so offensive to the intent of Congress in its' concern for this petitioners victimization^{as} to see Safir I as a vehicle from which to reject the literalism of the decision in the case of U.S. and Aloff vs Aster 275 F 2d 281, 283, 3 cir cert denied, 364 U.S. 894 (1960).

It has been pointed out by Judge Friendly in his examination of the history of the False Claims Act that Judge Hastie did not intend a literal reading with as broad an effect as was given by his brothers on appeal in "Aster".

The "literalism" which Judge Friendly applies to foreclose any participation in the recovery for this partitioner in Safir V is a far cry from the liberality shown to the violators in his interpretation of the meaning of the words of Section 810 in Safir I.

The Statute 46 USC 1227 states:

"No subsidy of any kind shall be paid, directly or indirectly out of the funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section".

After the finding of violation was res judicata wherein \$227,000,000.00 was illegally paid out (and which the Nixon Administration deemed subject to mitigation and reduced to approximately \$5,000,000.00 through the Administrative Law Judge, by recommendation, then halved by the MSB and then halved again by Secretary Dent) he seems content to pass the baton to the D.C circuit to call Secretary of Commerce Kreps for explanation of the difference between the arbitrary MSB arithmetic and the further capricious reduction by the Secretary.

The victim has been forgotten in the shuffle or would be if he would passively accept submission to leave him without remedy or relief.

What could be more offensive to the intention of Congress than to have the wording of both 46 USC 1227 of the Merchant Marine Statute and 31 USC 232 C interpreted in such manner as to so liberalize the former Statute and so literalize the latter Statute as to deny the victim the

Brandeisian promise that sustained him for the last ten years.

At oral argument, Judge Friendly stated to the effect that he regretted the absence of a reporter like Charles Dickens to have followed the ramifications of this case over the years. Presumably he had "Bleak House" in mind. While Dickens is dead, Joseph Heller is still alive. Petitioner realizes that the Court's examination of the legislative intent of the words "based on evidence or information" already in possession of the government may open a door to a reexamination of 31 USC 231, 232 to the Supreme Court and is grateful for this possibility.

Petitioner would prefer if this Court addresses the wording "when it shall be made to appear" in 31 USC 232C as examined in U S exrel Vance V Westinghouse 363, F Supp 1042, 1043 and in light of Judge Dooling's ANNEX A whether U.S. V Rippetoe 178 F 2d at 735 (4th Cir.(1949) the decision of Chief Judge Parker would not suffice to establish the Court's jurisdiction.

Petitioner prays that his motion for rehearing be granted and that the Court also further reexamine both "Templeton" and "Aster" to the end that, unlike the Valiant, he does not have to walk that extra mile.

Respectfully submitted,


Marshall P. Safir, Pro Se
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July 11, 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 770, 840—September Term, 1977.

(Argued May 31, 1978 Decided June 27, 1978.)

Docket Nos. 77-6219, 77-7626

MARSHALL P. SAFIR,
Plaintiff-Appellant,

v.

ROBERT J. BLACKWELL, Assistant Secretary
of Commerce, et al.,
Defendants-Appellees.

MARSHALL P. SAFIR,
Plaintiff-Appellant.

v.

AMERICAN EXPORT LINES, INC., et al.,
Defendants-Appellees.

Before:

FRIENDLY and TIMBERS, *Circuit Judges,*
and HOFFMAN, *District Judge.**

* Of the District Court for the Eastern District of Virginia, sitting by designation.

Appeals from orders of the District Court for the Eastern District of New York, John F. Dooling, *Judge*. One order denied plaintiff's motion to amend a complaint filed in 1968 against United States government officials to compel them to take action to recover subsidies alleged to have been illegally paid under § 810 of the Merchant Marine Act, 1936, 46 U.S.C. § 1227, see *Safir v. Gibson*, 417 F.2d 972 (2 Cir. 1969), *cert. denied*, 400 U.S. 850 (1970), so as to state a claim against the intervening subsidy recipients under the False Claims Act, 31 U.S.C. §§ 231 and 232. The other order dismissed an action brought in 1977 against the subsidy recipients under said Act.

Affirmed.

MARSHALL P. SAFIR, Brooklyn, N.Y., *Pro Se*.

GILBERT S. FLEISCHER, Esq., Department of Justice, New York, N.Y. (Barbara Allen Babcock, Assistant Attorney General, and David G. Trager, United States Attorney for the Eastern District of New York, of Counsel), *for Defendants-Appellees Robert J. Blackwell, et al.*

ELMER C. MADDY, Esq., New York, N.Y. (Kirlin, Campbell & Keating, Esqs., *for Defendant-Appellee United States Lines, Inc.*; James N. Jacobi, Esq., and Kurrus, Dyer, Jacobi & Mooers, Esqs., *for Defendant-Appellee American Export Lines, Inc.*; J. Franklin Fort, Esq., T.S.L. Perlman, Esq., William H. Fort, Esq., and Kominers, Fort, Schlefer & Boyer, *for Defendants-Appellees Lykes Bros. Steamship Company, Inc. and Moore-McCormack Lines, Inc.*, of Counsel).

ROBERT T. BASSECHES, Esq., Washington, D.C.
(Shea & Gardner, Esqs., Daniel H. Margolis, Esq., Warren L. Lewis, Esq., and Bergson, Borkland, Margolis & Adler, for *Defendants-Appellees American President Lines, Ltd., Prudential Lines, Inc., and PSS Steamship Company, Inc.*; Verne W. Vance, Jr., Esq., Arthur G. Telegen, Esq., and Foley, Hoag & Eliot, Esqs., for *Defendants-Appellees Farrell Lines*; Barrett, Smith, Schapiro, Simon & Armstrong, Esqs., for *Defendants-Appellees American President Lines, Ltd., Prudential Lines, Inc., PSS Steamship Company, Inc., and Farrell Lines, Inc.*, of Counsel.)

FRIENDLY, *Circuit Judge*:

Plaintiff-appellant Marshall P. Safir has been laboring for more than a decade to obtain a recovery for the United States of subsidies alleged to have been illegally paid to members of the Atlantic and Gulf American Flag Berth Operators (AGAFBO). The Federal Maritime Commission (FMC) held, on December 8, 1967, that in 1965 AGAFBO, with the purpose of eliminating Mr. Safir's company, Sapphire Steamship Lines, Inc. (Sapphire), from competing with the conference lines, had promulgated rates for Government cargoes in the North Atlantic trade which were so unreasonably low as to be detrimental to the commerce of the United States, contrary to the public interest, and, in consequence, violative of §§ 15 and 18(b)5 of the Shipping Act, 1916, 46 U.S.C. §§ 814, 817(b)(5). *Rates on U. S. Government Cargoes*, Docket No. 65-13, 11 F.M.C. 263, 287. Safir then requested the appropriate

government officials to recover subsidies allegedly paid illegally to AGAFBO members, on the grounds that these same discriminatorily low rates constituted a violation of § 810, Merchant Marine Act, 1936, 46 U.S.C. § 1227. These efforts proving unsuccessful, he brought a suit in 1968 in the District Court for the Eastern District of New York to prod the officials into action. Safir was rebuffed by the district court, but met with success here. *Safir v. Gibson*, 417 F.2d 972 (1969), *cert. denied*, 400 U.S. 850 (1970) (*Safir I*).

However, the Maritime Subsidy Board decided to follow an expensive and time-consuming course which would have required relitigation of the issues of violation already determined by the FMC. When Safir sought the aid of the district court in avoiding such duplicative proceedings, the law officers of the Government opposed him and the district court agreed. Again we took a different view, both when the appeal was first heard with only the Government as appellee, and later when the subsidy recipients, who had previously abstained from participating, see 417 F.2d at 976 n. 4, intervened in the action for the purpose of seeking a rehearing. *Safir v. Gibson*, 432 F.2d 137, 145 (2 Cir.), *cert. denied*, 400 U.S. 942 (1970) (*Safir II*). Following another resort by Safir to the Eastern District and to this court, this time unsuccessful, see *Safir v. Blackwell*, 469 F.2d 1061 (1972), *cert. denied*, 414 U.S. 975 (1973), (*Safir III*), the Maritime Subsidy Board directed in 1973 that a total of \$2,388,463.16 should be recovered from five AGAFBO lines that had been in direct competition with Sapphire. *Investigation of Alleged Section 810 Violation*, Maritime Subsidy Board S-243, 14 P&F Shipping Regul. Repr. 77, 78 (1973). On a discretionary appeal to the Secretary of Commerce pursuant to 46 C.F.R. § 202.1 (¶ 6.01), the latter, by order dated September 9, 1974, re-

duced the amounts to a total of \$1,126,522.26. The basis for this slash was what the Court of Appeals for the District of Columbia Circuit has called a "preemptory announcement" by the Secretary that "the record indicates that the United States Government actively induced the rate reductions here in issue," see *Safir v. Kreps*, 551 F.2d 447, 455 (D.C. Cir.), *cert. denied*, 46 U.S.L.W. 3215 (1977) (*Safir IV*).¹ When Safir complained to the courts of the inadequacy of the recovery, he was again opposed by the law officers of the Government. He was unsuccessful in the District Court for the District of Columbia, but the Court of Appeals, taking a different view, reversed and remanded with a direction that "the trial court should carefully scrutinize the evidentiary support for the Secretary's ruling and should, if necessary, remand the record to the Secretary for clarification of his reasons for interpreting the evidence as he has." 551 F.2d at 455.

With this frustrating background it is understandable that Safir should have decided the time had come to place the controversy in a posture where he, rather than Government officials, would control the prosecution. The instrument he chose was the "*qui tam*" statute which empowers any person to bring and carry on a suit on behalf of the government against anyone who has presented a claim against the United States for payment or approval, "knowing such claim to be false, fictitious, or fraudulent," 31 U.S.C. §§ 231 and 232.² His theory was that the steamship lines had submitted claims for subsidy, knowing that

1 It should be made clear that the Secretary who directed the reduction was Secretary Dent, not Secretary Kreps.

2 Safir had adverted to possible resort to a *qui tam* action in the 1972 proceedings before both the district court and this court, and had specifically mentioned the possibility of a later False Claims Act claim in an affidavit, see also *Safir III*, *supra*, 469 F.2d at 1063, but had not pursued this.

§ 810 of the Merchant Marine Act, 46 U.S.C. § 1227, and the corresponding clauses in their subsidy contracts made them ineligible for subsidies while they were charging rates which violated § 15 of the Shipping Act. Safir sought to invoke the *qui tam* statute in two ways: First, he filed an action against the steamship companies on May 25, 1977. After Safir had complied with the requirements of 31 U.S.C. § 232(C) with respect to advising the Attorney General of the pending action, the United States declined to enter the suit. Second, he moved to amend his 1968 complaint against government officials in which, as heretofore stated, the steamship lines had later intervened, so as to state a claim under the false claims statute,³ and moved to consolidate the two actions. The steamship lines opposed the motion for leave to amend the 1968 complaint and moved for summary judgment with respect to the 1977 action. Judge Dooling denied Safir's motion for leave to amend and granted the defendants' motion for summary judgment, and these appeals followed.⁴

The judge stated his reasons for denying leave to amend as follows:

While, as it would be amended, the complaint would in ultimate substance add a False Claims Act Count, that count does not arise out of the matter of original

3 The advantage of this course lay in the possibility of "relation back." F. R. Civ. P. 15(c), and consequent avoidance of serious difficulties with respect to the statute of limitations.

4 Defendants have not raised the claim that, as held in *United States v. Onan*, 190 F.2d 1, 6 (8 Cir.), *cert. denied*, 342 U.S. 869 (1951), a litigant cannot prosecute a *qui tam* action under 31 U.S.C. § 232 *pro se*. If we assume that such a claim would be well founded, the remedy would not be outright dismissal but a direction that the action be dismissed unless an attorney is retained. Compare *Phillips v. Tobin*, 548 F.2d 408, 415 (2 Cir. 1976) (stockholder's derivative action). At argument Mr. Safir expressed willingness to retain an attorney if either of the orders were reversed.

complaint. The original complaint sought to compel public officers to do what plaintiff contended that it was their duty to do. The claim rested on the contrast between the FMC decision that the AGAFBO rates were unjustly discriminatory and the failure of the Maritime Administration, Maritime Subsidy Board, to take appropriate action in the light of 46 U.S.C. § 1227. The new matter would add a completely new claim both as to substantive content and as to the identity of the persons against whom relief was sought. Nothing in the original case turned on the knowing presentation of a false, fictitious or fraudulent claim. There is no basis for authorizing an amendment that would transform the case, in effect dismiss the original defendants, and pursue a completely different claim. *Cf. Rosenberg v. Martin*, 2d Cir. 1973, 478 F.2d 520, 526-27; *United States v. Templeton*, E.D. Tenn. 1961, 199 F.Supp. 179, 183-84.

We can find no sound basis for disagreeing with this analysis.

The grant of summary judgment for the defendants on the 1977 complaint was based on the clause in 31 U.S.C. § 232, added by the Act of December 23, 1943, 57 Stat. 608, which reads:

The court shall have no jurisdiction to proceed with any [*qui tam*] suit whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.

The judge concluded that the information which Safir had already furnished to Congressional committees, to the FMC, and to the Maritime Administrator in the course of his

long fight to have AGAFBO's predatory rates declared unlawful and to cause the government officials to recover illegally paid subsidies constituted the very evidence on which the action under the False Claims Act would depend.⁵ Thus he had no need to consider the defendants' additional contentions that the 1977 action was time-barred and that their submission of subsidy claims could not be viewed as "false, fictitious or fraudulent" within the meaning of 31 U.S.C. § 231.

It is established that the "whenever it shall be made to appear" defense to a *qui tam* suit being prosecuted by the relator may be made not only by the United States but by a defendant. *United States ex rel. Leslie v. Potomac Electric Power Co.*, 208 F.2d 39, 41 (D.C. Cir. 1953); *United States v. Pittman*, 151 F.2d 851, 853 (5 Cir. 1945) (dictum), *cert. denied*, 328 U.S. 843 (1946). The leading court of appeals decision construing the clause, *United States and Aloff v. Aster*, 275 F.2d 281, 283 (3 Cir.), *cert. denied*, 364 U.S. 894 (1960), gives it a literal reading which supports the ruling by the district judge that knowledge by the government prior to suit bars the action, even if the plaintiff is the source of that knowledge. We, like others, see *United States ex rel. Vance v. Westinghouse Electric Corp.*, 363 F.Supp. 1038, 1041-42 (W.D. Pa. 1973); *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F.Supp. 1144, 1150-52 (S.D. Cal. 1976) (dictum), are not

5 The judge stated that the only new evidence alleged by Safir, excerpts from which were attached to his opinion, "related to a corrupt arrangement to frustrate plaintiff's endeavor to vindicate his claims" by a "deal" and concluded that this "is neither germane to the False Claims Act case nor to the Government's claims under 46 U.S.C. § 1227, nor is it material that was not in the possession of the Government since it professedly came from 'leaks' from the Watergate Special Prosecutor's office." Since we agree that the matter was not germane to the False Claims Act claim, we have no occasion to consider the correctness of the judge's two other propositions.

altogether happy with this approach, which extends the clause considerably beyond the evil sought to be remedied and gives it a broader effect than would be indicated by the legislative history reviewed by Judge Hastie in the district court decision, 176 F.Supp. 208, 209-10 (E.D. Pa. 1959), affirmed in *Aster*, and by Judge Knox in *Vance*, *supra*, 363 F.Supp. at 1041-42. Safir is at an opposite pole from the "mere busybody who copies a Government's indictment as his own complaint and who brings to light no frauds not already disclosed and no injury to the Treasury not already in process of vindication", described in the dissent of Mr. Justice Jackson in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 558 (1943), the case which inspired the 1943 amendments to the *qui tam* statute. Moreover, it seems rather curious that an informer who makes only a partial or merely conclusory disclosure to the United States before filing suit, should be free to carry on a *qui tam* action or to receive an award, 31 U.S.C. § 232(E)(1), if the United States elects to take over the prosecution, whereas the informer who has already furnished complete information should be barred from either. We have wondered whether some argument could be made for the plaintiff on the basis that no one in the Government had entertained any thought of pursuing the steamship companies under 31 U.S.C. § 231 which permits recovery not simply of any subsidies illegally paid but of "the sum of \$2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit." However, this would be true in almost any false claims suit which was not duplicative of one already filed or in course of preparation by the Government. Moreover, such an argument would still confront the obstacle that the false claims suit would be

"based upon evidence or information" already in the possession of the Government, and would have to face our decision in *United States ex rel. Greenberg v. Burmah Oil Co.*, 558 F.2d 43, 45-46 (2 Cir.), *cert. denied*, 46 U.S. L.W. 3357 (1977), see also *United States ex rel. Bayarsky v. Brooks*, 110 F.Supp. 175, 180 (D.N.J. 1953), *aff'd* 210 F.2d 257 (3 Cir. 1954); *United States ex rel. McCans v. Armour & Co.*, 146 F.Supp. 546, 549 (D.D.C. 1956), *aff'd* 254 F.2d 90 (D.C. Cir.), *cert. denied*, 358 U.S. 834 (1958).

While a case may arise when the literalism of *Aster* would be so offensive to the intention of Congress as to demand a more liberal approach, we do not think this to be one. Despite his years of valiant effort, when all is said and done, Mr. Safir had three choices available to him in the late 1960's. He could have instituted a treble damage action on behalf of himself and his company for injury to business or property under the precise terms of § 810 of the Merchant Marine Act, 1936, 46 U.S.C. § 1227; he could, if he had thought of it, have withheld at least some information from the Government and brought a *qui tam* action under 31 U.S.C. §§ 231-232; or he could have done what he did, namely, endeavor to force the Maritime Administrator to take action to recover subsidies illegally paid. Under either of the first two courses, he would have been required to incur the complete burden of the expense of prosecution unless the Government elected to take over the *qui tam* action. Having opted for the third course and thereby involved the Government with the full expense of prosecution, he may not now bring a *qui tam* action on the basis of the same information he has already furnished.

The orders are affirmed.

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**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 75-2050

MARSHALL P. SAFIR,

Appellant,

—v.—

**JUANITA M. KREPS, Individually and
as Secretary of Commerce, et al.**

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 74-1474)

Argued October 27, 1976

Decided February 11, 1977

Marshall P. Safir, appellant pro se.

Richard A. Olderman, Attorney, Department of Justice, with whom Rex E. Lee, Assistant Attorney General, Earl J. Silbert, United States Attorney, and William Kanter, Attorney, Department of Justice, were on the brief, for federal appellees. Barbara L. Herwig, Attorney, Department of Justice, also entered an appearance for federal appellees.

Attachment B

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Robert T. Basseches and *Daniel H. Margolis*, with whom *Warren L. Lewis* was on the brief, for intervenors-appellees. American President Lines, Ltd., Prudential Lines, Inc., and PSS Steamship Company, Inc. *Verne W. Vance* was on the brief for intervenor-appellee Farrell Lines, Inc.

J. Franklin Fort, with whom *T. S. L. Perlman* and *William H. Fort* were on the brief, for intervenors-appellees Lykes Bros. Steamship Lines, Inc. and Moore-McCormack Lines, Inc.

James N. Jacobi was on the brief for intervenor-appellee American Export Lines, Inc.

Elmer C. Maddy was on the brief for intervenor-appellee United States Lines, Inc.

Before *WRIGHT*, *MCGOWAN*, and *MACKINNON*, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge WRIGHT*.

WRIGHT, Circuit Judge: This case involves the most recent episode in a ten-year battle by appellant, Marshall P. Safir, to force the United States Government, acting at various times through the Maritime Subsidy Board, the Maritime Administrator, and the Secretary of Commerce, to recover construction differential subsidies and operating differential subsidies paid to various shipping companies collectively called the Atlantic and Gulf American Flag Berth Operators (AGAFBO). At this stage in the proceedings appellant has won decisions in the Second Circuit forcing the Maritime Administrator to take action on appellant's claims, *Safir v. Gibson*, 417 F.2d 972 (2d Cir. 1969) (*Safir I*), and further holding that

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the AGAFBO lines are estopped from relitigating a finding of the Federal Maritime Commission that the lines engaged in predatory behavior against appellant's steamship company, Sapphire Steamship Lines, Inc., *Safir v. Gibson*, 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 850 (1970) (*Safir II*), *Safir I* also established that Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. § 1227 (1970), which prohibits payment of subsidies to lines engaging in predatory practices, also allows the United States to seek recovery of subsidies paid to shipping lines during the period of their predatory behavior but before it is discovered. *Safir I* at 977. The Maritime Subsidy Board has now rendered an opinion, *Investigation of Alleged Section 810 Violation*, 3 Maritime Subsidy Board Reports 128 (1973) (interim order), Supp. App. 160, — Maritime Subsidy Board Reports —, 14 P & F SHIPPING REGULATION REPORTS 77 (1973) (final order), JA 33, requiring various amounts of operating differential subsidies to be recovered from lines in direct competition with Sapphire Steamship Lines, Inc. (the "Trade intervenors"), but exonerating certain other AGAFBO members (the "Non-Trade intervenors"). This decision was appealed by the AGAFBO lines to the Secretary of Commerce who, in an order dated September 9, 1974, JA 2, affirmed the Board in all respects except that he further mitigated the amount of subsidy to be recovered from the Trade intervenors.¹

Directly at issue here is an order of the District Court denying appellant's motion for summary judgment and granting appellees' and intervenors' motions for sum-

¹ Further elaboration of facts of this case may be found in *Safir I* and *Safir II*.

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mary judgment.² We reverse and remand this case to the District Court for further proceedings as indicated in this opinion.

At the outset, a word is in order about the general approach which ought to be taken to this case. As all parties are well aware, the administrative proceedings sought to be reviewed here would never have been instituted in the absence of the Second Circuit's decision in *Safir I*. And, although that court did not order the precise form of proceedings which have been conducted here,³ it indicated that comparable proceedings would have been ordered in the absence of voluntary action intended to discharge the obligation of the Maritime Administrator "to make a considered decision whether to recover the subsidies paid in the past," *Safir I* at 978. See *Safir II* at 144. The vagaries of the form and venue of proceedings for judicial review of administrative action should not, therefore, be allowed to obscure the fact that the central issue here is whether the mandate of the Second Circuit has been discharged. Nor should the discontinuous nature of the judicial proceedings or the change of forum from New York to Washington cloud the fact that we are here dealing for all practical purposes with a single continuing lawsuit. For this reason we think it inappropriate to reopen issues which have been resolved by the Second Circuit unless there has been a supervening change of law or fact which makes the prior resolution of an issue plainly erroneous.

² Appellees also made motions to dismiss. All motions before the District Court were treated as motions for summary judgment, see Order of Judge Bryant, JA 1, and we adopt this nomenclature herein.

³ See pp. 13-14, *infra*.

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I

We now take up *seriatim* issues raised by the intervening Trade and Non-Trade Lines and the Secretary of Commerce in support of their respective motions for summary judgment. We deal here only with those points raised on appeal, assuming that points raised below but not pressed here have been abandoned by the parties.

1. *Appellant's Standing.* The standing issue has already been litigated in *Safir I*, a suit brought by three parties: appellant Safir, his partner Arnold Weissberger, and Sapphire Steamship Lines. Read literally, that opinion affords standing only to Sapphire. See *Safir I* at 977. However, we think such a limited construction is unwarranted. The only evidence of an essential point—that Sapphire “ha[d] not washed [its] hands of the business,” *id.* at 978—was Safir’s affidavit that “he desired to return to the shipping business as soon as possible.” *Id.* Nor do we think much can be made of the characterization of Sapphire as the “victim” of the predatory practices since it is now clear, as it apparently was not at the time of *Safir I*, that Sapphire’s financial losses have been transferred at least in part to Safir in his capacity as personal guarantor of many of Sapphire’s debts. Moreover, we find no evidence at all that the Second Circuit intended to distinguish between the corporate entity—Sapphire—and its co-owners for purposes of standing. If it had intended to do so, it should have dismissed the claims of both appellant Safir and his partner Weissberger in *Safir I* and again in *Safir II*, but this it did not do. We hold, therefore, that *Safir I* established as of 1969 appellant’s standing to sue to force the Maritime Administrator to make a “considered decision” on whether to seek recoveries. We further hold

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that implicit in the grant of standing in *Safir I* is a further grant of standing to seek judicial review of the decision of the Administrator (or Secretary of Commerce) once it was made.

Our inquiry is not finished by an examination of the scope of *Safir I*, however, because there has been a major clarification of the meaning of standing under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), since *Safir I* was decided. In *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), the Supreme Court announced a two-part test for standing to challenge administrative action: first, "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise," *id.* at 152; and, second, "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," *id.* at 153. Subsequent cases put a gloss on these requirements. Of particular importance here is the decision in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), in which the Court added the requirement that "the plaintiff who seeks to invoke judicial power stand to profit in some personal interest [if he wins the suit]." 426 U.S. at 39.

Although the *Safir I* court did not phrase its standing opinion in the above terms, we think *Safir's* standing under subsequently announced law nonetheless follows from what was said in *Safir I*. *Safir I* holds that Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. § 1227 (1970), was intended by Congress "to promote the competitive interest of a victim by authorizing the recovery

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of subsidies improperly paid in the past * * *." *Safir I* at 978. From this language it is clear that, if *Safir* still has a competitive interest, it is one within the "zone of interests" protected by Section 810, and the second *Data Processing* standing requirement is met. The Second Circuit's analysis of the congressional history of Section 810 also establishes that Congress thought potential competitors would benefit from recovery of subsidy payments since such recovery "poses an added cost on the violators and thus will partially make up to the victim for the burden which the earlier payments indirectly imposed on him." *Id.* at 977 (footnote omitted). We do not think either *Data Processing* or *Simon* requires appellant to demonstrate the truth of the above proposition. It is enough if Congress thought a victim would "profit" through recovery of illegally paid subsidies and consequently failure of the Maritime Administrator to extend the intended benefit to a victim is injury in fact. Again, however, *Safir* must continue to be a potential competitor of the shipping lines which illegally took the subsidies if he is to benefit from a decision to recover such subsidies.

For the foregoing reasons, the three standing issues come down to one: Is *Safir* a potential competitor of the Trade and Non-Trade Lines? We begin by restating that *Safir I* established that *Safir* had this status in 1969. See pages 4-5 *supra*. Appellant's desire to re-enter the shipping business has apparently not changed, see Complaint ¶ 3, Supp. App. 250, and appellees and intervenors here have pointed to no change in circumstances which would cause us to question the conclusion of the Second Circuit that "an interruption of operations like that here does not sufficiently alter the victim's interest to take it

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out of the protection of § 810 * * *.” *Safir I* at 978. Moreover, for us to hold today that the Secretary of Commerce can divest a person in appellant’s position of standing simply by footdragging would scarcely serve the interest of Congress or the Constitution. After all, the Secretary’s initial and allegedly continuing unwillingness to protect *Safir*’s interests may well be a contributing factor to *Safir*’s inability to re-enter the shipping business—certainly Congress (in the Second Circuit’s view) thought that prompt termination and recovery of subsidies would be of material assistance to the victim of predation. Nor do we see how any Article III purpose would be served by refusing *Safir* a forum in which he might contest the adequacy of the Secretary’s compliance with an unquestionably valid order of the Second Circuit, especially where the only apparent ground for such refusal would be delay caused by the very dilatoriness of the Secretary and the Administrator which led to the initial suit. For all of the above reasons, therefore, we decline to hold that the passage of time has removed appellant’s standing to prosecute this action.⁴

2. *Exhaustion of Administrative Remedies.* The United States argues that appellant *Safir*’s failure to participate in the review proceedings before the Secretary of Commerce should act as a bar to relief in the District Court. We disagree, finding this argument to be prematurely raised.

It appears that appellant participated fully in the proceedings before the administrative law judge (ALJ)

⁴ Because we hold today that *Safir I* established appellant *Safir*’s personal standing to bring suit, we need not consider the effect of § 70 of the Bankruptcy Act, 11 U.S.C. § 110 (1970), on appellant’s claim.

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and the Maritime Subsidy Board in Docket No. S-243, which is here under review. Upon entry of the final order of the Board, appellant turned to the District Court for review. Intervenor, on the other hand, petitioned the Secretary of Commerce for further administrative review of the Board's order under procedures set out in 46 C.F.R. § 202.1 (1976). The Secretary granted intervenors' petitions and, as a result, the District Court dismissed Safir's complaint as premature. *Safir v. Dent*, No. 2156-73 (D. C.D. May 9, 1974), *aff'd*, No. 74-1716 (D.C. Cir. Feb. 18, 1975) (Supp. App. 246, 256).

The failure of Safir to appear before the Secretary does not in itself require dismissal of this petition for review. Administrative review before the Secretary is nowhere made mandatory. It is a matter of grace, not right, as the language of the regulation itself evidences: "The Secretary * * * *may*, on his own motion or on the basis of a petition filed as hereinafter provided, review any decision, report and/or order of the Maritime Subsidy Board * * *." 46 C.F.R. § 202.1 (¶ 6.01) (emphasis added). In addition, there is no requirement that parties participate in any review proceedings that the Secretary has established. Although all parties of record are served with the petitions for review, the regulation states that parties so served "*may* file replies in writing there to," *id.* (emphasis added), not that they must. Finally, there can be no doubt that Safir has protected his right to seek judicial review by filing a complaint in the District Court which would have been timely but for its ultimate prematurity.

Nonetheless, appellant is not free to raise points without regard to whether they were argued at some stage of the administrative process. While an exhaustion requirement is not codified in the Merchant Marine Act,

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it is a generally recognized common law principle. See, e.g., 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.01, at 56-57 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424 (1965). The purpose of exhaustion—to allow an agency “to consider [a] matter, make its ruling, and state the reasons for its action,” *Unemployment Comm’n v. Aragon*, 329 U.S. 143, 155 (1946), so that it will have “an opportunity to correct [any] error, if error there be,” *Brotherhood of R.R. Trainmen v. Chicago, M., St. P. & Pac. R. Co.*, 380 F.2d 605, 608 (D.C. Cir.), cert. denied, 389 U.S. 928 (1967)—is narrow, however. So long as the appellant or some other party has put an objection on the record, the obligation to exhaust is discharged. This is especially so at the stage of secretarial review since such review is carried out on the record already made. In particular, the Secretary must be charged with notice of objections raised in prior administrative or judicial proceeding.

Applying this principle to the issues raised on this appeal, we hold that there has been no demonstration that appellant has failed to raise below all issues now in contention. As we understand the present state of affairs, all appellant Safir has so far proffered for decision is the narrow question whether there was any room under Section 810 for discretionary reduction of amounts of operating and construction subsidies to be recovered. See Plaintiff's Motion for Summary Judgment, Supp. App. 267-268. Sarfir's second claim—that the Secretary has abused his discretion—is not presently before the District Court and could not properly be so since the administrative record has not yet been filed with that court. On the narrow issue of discretion, there can be no doubt that the Secretary and every party here had adequate

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notice of Safir's contentions. These contentions were the subject of *Safir I* and *Safir II*. The briefs in these cases were certainly available to the Secretary since his agent, the Maritime Administrator, was a defendant in both suits. The opinions of the Second Circuit are a matter of public record and well known to all involved. It appears that Safir also presented these claims to the ALJ and to the Maritime Subsidy Board. See *Investigation of Alleged Section 810 Violation, supra*, 3 Maritime Subsidy Board Reports at 141, Supp. App. 181. What more, then, was there to be said by a non-lawyer about the appropriate construction of Section 810?

There will be more than enough opportunity to raise waiver issues again once the trial court has the administrative record before it and can assess the possibility of prejudice in terms of the actual argument and evidence adduced before the ALJ and the Board. If actual prejudice appears at that time, the trial court is free to reconsider the waiver issue including any extenuating circumstances which would make imposition and exhaustion requirement inequitable.

3. *Collateral Estoppel or Res Judicata.* We agree with appellees' position that appellant may not relitigate questions that were actually decided in either *Safir I* or *Safir II*. We disagree, however, with appellees' contention that the holdings of these cases are sufficiently broad to warrant dismissal of appellant's complaint. Two issues were raised in *Safir I*: whether Safir had standing, and, if so, whether the Administrator's decision not to seek refunds of subsidies paid was a matter "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2) (1970) and therefore unreviewable. Both issues were decided in Safir's favor; however, only the second is

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relevant here. On the discretion point the *Safir I* court held that the Maritime Administrator could not "refuse to proceed against AGAFBO lines without at least considering the interest of the victim, about which Congress was so concerned," and that he "was at least required to make a considered decision whether to recover the subsidies paid in the past." *Safir I* at 978. *Safir I* thus indisputably rejected the Administrator's extreme position that his decision whether or not to seek recovery was unreviewably committed to his discretion. This holding is consistent with the supervening case of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), and consequently we do not inquire further into it.

Safir I, in addition to rejecting the Administrator's claim of unreviewable discretion, specifically reserved the question whether "there may be other limits on [the Administrator's] discretion" going beyond the requirement that he consider the victim's interest before deciding not to seek recovery of subsidies paid. *Safir I* at 978. However, when in *Safir II* appellant sought to test these limits by arguing that the Administrator had no discretion to do other than seek recovery of all subsidies paid to all AGAFBO members, this extreme position was rejected. In a footnote the Second Circuit stated:

Nothing we have said should be read as preventing the Maritime Administration from investigating the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom.

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Safir II at 145 n.2. The propriety of the Administrator's considering "the nature and extent of the individual carriers' participation" was reiterated on rehearing. *Safir II* at 146. As matters now stand, therefore, the District Court properly rejected appellant's sole contention on his motion for summary judgment that "the Secretary of Commerce, through his constituent agency, the Maritime Administration—Maritime Subsidy Board, is under a mandatory duty to impose the inflexible [*sic*] sanction of Section 810 * * * to recover all construction and operating subsidies paid * * *." Supp. App. 268.

Nevertheless, the District Court could not properly dismiss *Safir's* complaint as a whole since that complaint is not limited to the sweeping claim that the Secretary lacked any discretion to demand recovery of less than the full amount of subsidies paid.⁵ It alleges that the Maritime Subsidy Board and the Secretary abused whatever discretion they may enjoy by arbitrarily and capriciously mitigating the penalty assessed against AGAFBO, *see* Complaint ¶¶2, 5, 6.b, Supp. App. 249, 251, and particularly questions the propriety of the Secretary's further mitigation of recoveries,⁶ which was based solely on Government complicity in (and benefit from) the predatory act of the AGAFBO lines, *see id.* ¶ 6.b, Supp. App. 251. Litigation of this and other issues raised by *Safir's*

⁵ Appellant apparently sought to resolve by summary judgment only issues which could be decided without examination of the administrative record, an approach ultimately sanctioned by the District Court when it consolidated and then stayed the actions brought by intervenors herein. *See* Order of April 10, 1975 (Docket Item No. 32).

⁶ Order of the Secretary of Commerce in Maritime Subsidy Board Docket S-243, Sept. 9, 1974, J 1 2.

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complaint, such as the propriety of reducing subsidy recovery to reflect the proportion of military cargo carried by the predatory lines, and hence in direct competition with Sapphire Steamship Lines, Inc.,⁷ is not barred. The propriety of considering such factors could not have been litigated before the Second Circuit because the orders announcing the Administrator's reliance on them were not entered until after *Safir II*. Therefore, such issues are plainly open now no matter what theory of estoppel is applied to the Second Circuit's decisions. Moreover, consistent with our view that what is really at issue here is the Administrator's (Secretary's) discharge of the Second Circuit's mandate, the general issue of the arbitrariness of the precise action taken is and must be open for review now, regardless of any discretion which the Administrator may enjoy. See *Citizens to Preserve Overton, Park Inc. v. Volpe*, *supra*.

II

From what we have said above it should be clear that there are issues to be tried on remand. In particular, it is necessary for the trial court to determine whether the various factors other than the "extent of individual carriers' participation in the illegal action," *Safir II* at 145 n.2, cited by the Administrator and the Secretary as justifying mitigation can properly be considered, given the purpose and legislative history of Section 810 and its construction in other cases. In other words, the issue reserved by the Second Circuit in *Safir I*—the precise limits on the Administrator's (Secretary's) discretion not to seek recovery of all subsidies paid—must now be decided. If it is decided that all the cited factors could

⁷ *Investigation of Alleged Section 810 Violation*, 3 Maritime Subsidy Board Reports 128, 161-167 (1973), Supp. App. 216-223.

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lawfully be considered, the trial court must further determine whether the Administrator (Secretary) acted arbitrarily or capriciously, or abused his discretion in this case, given the facts developed in the hearing before the ALJ. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra*; *Dunlop v. Bachowski*, 421 U.S. 560 (1975).

If it becomes necessary for the District Court to review the facts found by the Maritime Subsidy Board or the Secretary, it will first have to determine whether the appropriate standard of review is substantial evidence on the record as a whole, see 5 U.S.C. § 706(2)(E), or whether the facts found must merely be free of arbitrariness or caprice, given the evidence adduced, see *Dunlop v. Bachowski*, *supra*. In making this determination, the trial court should be aware of the unusual procedural posture of this case. The hearings before the ALJ were begun "to provide a basis for recommending to the Maritime Subsidy Board * * * the appropriate action that should be taken" in response to the order of the Second Circuit in *Safir I*. See Maritime Subsidy Board Order in Docket S-243 at 3 (Oct. 24, 1969). Ultimately, however, a final order was entered which purports to conclude an adjudication of the amounts owing. See *Investigation of Alleged Section 810 Violation*, — Maritime Subsidy Board Reports —, — (1973), JA 45-46. While there is some sanction for this form of procedure in *Safir II* at 144, we would not have thought that a formal adjudication was required to discharge the obligation put on the Administrator in *Safir I*. Cf. *Dunlop v. Bachowski*, *supra*. In addition, no statutory provision has been called to our attention which would authorize the Secretary, Administrator, or Board to adjudicate what Judge Friendly characterized as a contract dispute. See *Safir I* at 977. Because no one has objected to the procedures adopted and because this decade-long

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litigation has already consumed more than enough judicial and administrative time, however, we would be strongly inclined simply to ignore the procedural anomalies of this litigation and assume with the parties that the proper procedure is quasi-adjudicative and consequently the proper standard of review is substantial evidence on the record as a whole. Nonetheless, since this is a case of first impression and since the parties have not yet addressed the standard of review issue, we leave the determination of the appropriate standard to the trial court for further examination.

III

While we do not wish to prejudge issues more properly decided by the District Court on remand, efficiency does require us to indicate our views on one issue. The opinion of the Secretary is a document remarkable for its brevity. Brevity, however, while the soul of wit, can be the bane of judicial review. This is the case here with the Secretary's Order further reducing amounts to be recovered solely because of Government participation in and benefit from the lowering of rates to non-competitive levels. See Order of the Secretary of Commerce in Maritime Subsidy Board Docket S-243, JA 2. His Maritime Subsidy Board found, however, "that at best [Government] pressure was a relatively minor consideration in the trade respondents' rate reductions." *Investigation of Alleged Section 810 Violation, supra*, 3 Maritime Subsidy Board Reports at 144, Supp. App. 185. This conclusion rests on many factors, among which we find particularly persuasive testimony of the shippers' own officials that such pressure was not a factor causing rates to be reduced, *see id.* at 148 & n.36, Supp. App. 193, and the Board's astute observation that

if the trade respondents were bowing to unrelenting pressure from the military for rate reductions,

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District of Columbia Circuit*

it is a curious mystery why AGAFBO members let its condemned reduced rates revert to former high levels in the very teeth of such pressure.

Id. at 148-149, Supp. App. 193. When these detailed and plausible findings of the Board are compared to the peremptory announcement of the Secretary that "the record indicates that the United States Government actively induced the rate reductions here in issue," JA 2, the conclusion is virtually compelled that the Secretary has simply failed to come to grips with the difficulties in the evidence in the record. Certainly the Secretary's failure to identify the evidence in support of his reversal of the Board gives little assurance that we have been presented with an order resulting from a reasoned decision-making process. Because of this unexplained inconsistency between the findings of the Secretary and of the Board, the trial court should carefully scrutinize the evidentiary support for the Secretary's ruling and should, if necessary, remand the record to the Secretary for clarification of his reasons for interpreting the evidence as he has. See *Camp v. Pitts*, 411 U.S. 133 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra*, 401 U.S. at 415-416.

IV

For the reasons stated above, the order of the District Court is reversed and this case is remanded for further proceedings consistent with this opinion.*

Reversed and remanded.

* Further appellate consideration of the issues raised here would be greatly facilitated if the District Court would reinstate its order of consolidation entered in Nos. 74-1474, 74-1788, and 75-0077 on March 5, 1975 (Docket Item No. 29), which was modified on April 10, 1975 (Docket Item No. 32), so that the contentions of all parties can, in the future, be disposed of at one time.

*Appendix A—Opinion of the Court of Appeals,
District of Columbia Circuit*

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2050

September Term, 1976

Civil Action No. 74-1474

MARSHALL P. SAFIR, *Appellant*

v.

JUANITA M. KREPS, Individually

and as Secretary of Commerce, *et al.*

Before WRIGHT, MCGOWAN, and MACKINNON, Circuit
Judges.

Order

It is ORDERED by the court that the opinion in the
above entitled case filed this day, February 11, 1977, be
and it hereby is amended as follows:

On page 9, line 17 of the first full paragraph,
insert before the comma: "and pursued all manda-
tory review procedures"

Per Curiam
For the Court
GEORGE A. FISHER
Clerk

United States Court of Appeals
For the District of Columbia Circuit
Filed Feb. 11, 1977
GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 571/2/3—September Term, 1968.

(Argued June 2, 1969 Decided September 26, 1969.)

Docket Nos. 33389/90/91

MARSHALL P. SAFIR, ARNOLD WEISSBERGER and
SAPPHIRE STEAMSHIP LINES, INC.,

Plaintiffs-Appellants,

—v.—

ANDREW GIBSON, Successor to and Substituted for JAMES
W. GULICK, Acting Maritime Administrator, Maritime
Administration, United States Department of Com-
merce, JAMES S. DAWSON, JR., Secretary, Maritime Sub-
sidiary Board, Maritime Administration, United States
Department of Commerce, and MAURICE STANS, Succes-
sor to and Substituted for C. R. SMITH, Secretary of
Commerce of the United States,

Appellees.

Before:

WATERMAN, FRIENDLY and KAUFMAN,

Circuit Judges.

Appeal from an order of the District Court for the
Eastern District of New York. John F. Dooling, Jr., *Judge*,
dismissing a complaint by an American-flag steamship com-
pany and two of its officers and stockholders seeking a

ATTACHMENT C

declaratory judgment and an order compelling the Maritime Administration to recover subsidies already paid and to cease further payments to members of a conference found by the Federal Maritime Commission to have engaged in predatory tactics to destroy competition on the part of plaintiff steamship company. Reversed and remanded.

ISADORE B. HURWITZ, New York, N. Y., for *Plaintiffs-Appellants*.

DANIEL JOSEPH (William D. Ruckelshaus, Assistant Attorney General; Vincent T. McCarthy, United States Attorney; Alan S. Rosenthal, Attorney, Dep't of Justice, Washington, D. C.), for *Appellees*.

FRIENDLY, *Circuit Judge*:

The plaintiffs in this action are Sapphire Steamship Lines, Inc., and two of its officers and stockholders. In March, 1965, Sapphire began operations as an unsubsidized common carrier by water, undercutting the rates of various carriers which were members of a conference known as the Atlantic and Gulf American Flag Berth Operators (AGAFBO). Shortly thereafter, on March 29, 1965, AGAFBO drastically reduced its rates to an admittedly unfair, unreasonable and noncompensatory level. As a result of this reduction, Sapphire was deprived of cargo which was indispensable to its profitable operation. Some eleven months later, on March 1, 1966, AGAFBO raised its rates to their former levels. Sapphire went out of business in March of the following year and was adjudged a bankrupt that May.

On December 12, 1967, the Federal Maritime Commission issued a report, Docket No. 65-13, on the result of an investigation "of virtually the entire spectrum of the U.S. military cargoes," in which AGAFBO was a respondent. The Commission concluded that "the drastic reductions [in AGAFBO's rates] were designed for but one purpose, the elimination of Sapphire from the carriage of military cargo" by unfair competition, and thus were "so unreasonably low as to be detrimental to the commerce of the United States and contrary to the public interest as well." The Commission found that by willfully setting its rates at this level AGAFBO violated §15 of the Shipping Act, 1916, as amended, 46 U.S.C. §814.¹

Counsel for Sapphire promptly wrote the Acting Maritime Administrator and the Maritime Subsidy Board requesting that subsidy payments to members of AGAFBO be terminated and that action be instituted to recover subsidies paid since March 29, 1965, the date AGAFBO reduced its rates.² The request was based on §10 of the

1 The commission elaborated on its findings as follows:
AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire. AGAFBO's rates were contrary to the public interest because they were predatory in nature and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the Act. (Footnote omitted.)

Two of the four Commissioners who participated in the report would also have found that the members of AGAFBO engaged in a conspiracy to drive Sapphire out of the trade.

2 The functions now performed by the Federal Maritime Commission and by the Maritime Administration and its Subsidy Board were originally vested in the United States Maritime Commission. By Reorganization Plan No. 21 of 1950, 64 Stat. 1273, and Reorganization Plan No. 7 of 1961, 75 Stat. 840, the regulatory functions of the United States Maritime Commission were transferred to the Federal Maritime Commission, an independent agency, and the functions re-

Merchant Marine Act, 1936, 46 U.S.C. §1227, which provides:

It shall be unlawful for any contractor receiving an operating-differential subsidy under sections 1171-1182 of this title or for any charterer of vessels under sections 1191-1204 of this title to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.

No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

The Secretary of the Subsidy Board answered that the Board would "take whatever action it deems appropriate in keeping with the provisions of the Merchant Marine Act

lating to the award, amendment, and termination of subsidy contracts were transferred to the Maritime Administration, an agency within the Department of Commerce.

of 1936, as amended." Similar letters written after expiration of the time to appeal from the FMC's decision received a similar noncommittal reply. In fact, the Maritime Administration has taken no action whatever.

Plaintiffs thereupon instituted this suit in the District Court for the Eastern District of New York against the Acting Maritime Administrator, the Secretary of the Subsidy Board, and the Secretary of Commerce. The complaint alleged substantially the foregoing facts and sought a declaration that §810 barred subsidy payments to the AGAFBO lines and an order compelling defendants to stop such payments and to take appropriate legal action to recover subsidies paid since March 29, 1965. Federal jurisdiction was sufficiently predicated on 28 U.S.C. §1337, which gives the district courts jurisdiction over any actions arising under any Act of Congress regulating commerce, cf., *Empresa Hondurena de Vapores, S.A. v. McLeod*, 300 F. 2d 222, 226-27 (2 Cir. 1962), vacated on other grounds sub nom. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), and 28 U.S.C. §1361, which gives the district courts jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."³ On defendants' motion the complaint was dismissed for failure to state a claim on which relief could be granted.⁴ The plaintiffs have appealed.

3 We thus need not consider the mooted question whether §10 of the APA, 5 U.S.C. §§701-04, constitutes an independent basis for federal jurisdiction. See Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 Harv. L. Rev. 308, 326-31 (1967).

4 The defendants also moved to dismiss the complaint for improper venue and for failure to join indispensable parties, or, in the alternative, for a transfer to the District of Columbia under 28 U.S.C. §1404

Two major issues are presented: Whether plaintiffs have standing to sue, and if so, to what extent the acts complained of are unreviewable because they are committed to agency discretion. Neither question can be answered without a close examination of the statute to determine what interests it was designed to protect and how it was designed to protect them. It is unfortunate—though not surprising—that §810 does not deal expressly with a situation where the Maritime Administrator refuses to take steps concerning subsidy payments to violators; since it does not, we must analyze the statutory scheme as a whole and the legislative history of the Act to arrive at a judgment of what Congress would have wanted done if this problem had occurred to it.

At the outset we must reject the suggestion of the district court that because the statute is difficult to interpret, its interpretation is a matter entirely within the agency's discretion. As Professor Jaffe has said, "Discretion . . . is not self-defining; it does not arise parthenogenetically from 'broad' phrases. Its contour is determined by the courts, which must define its scope and its limit." Jaffe, *Judicial Control of Administrative Action* 572 (1965). We deal here with an issue requiring reconciliation of two conflicting statutory purposes—the general policy of the Act to build up the American merchant marine through subsidy

(a). The court below found it unnecessary to pass on these points in view of its holding that the complaint failed to state a cause of action.

While the parties have not discussed in this court whether the AGAFBO lines were required to be joined as defendants, we are concerned that disposition of the action in their absence "may . . . as a practical matter impair or impede" their ability to protect their interests in the subject matter of this litigation. F.R. Civ. P. 19. Accordingly, if the district court should require their joinder or if they should intervene, we would not wish the district court to feel that anything said in this opinion precludes its considering any new arguments which the AGAFBO lines may bring to its attention.

payments and the direction of §810 for withdrawal of those subsidies when they are used to hurt rather than help. "The question in each case of consistency with statutory purpose is addressed to the judge." *Id.* at 575.

The Merchant Marine Act, 1936, §§501-610, 49 Stat. 1995, provided a new method of subsidizing American-flag shipping, primarily by construction-differential and operating-differential subsidies. In the course of debate, Senator O'Mahoney of Wyoming and Senator Clark of Missouri brought up the case of a subsidized American-flag line which by a conference agreement with foreign lines was "crushing out of existence an American line which enjoys no subsidy." The victim had assured the committee that "without any subsidy, if removed from the incubus of this conference and of the subsidy which is granted to the American subsidized line, . . . [it] could compete with all the lines of the world." 80 Cong. Rec. 9921 (1936). Senator O'Mahoney asked Senator Copeland of New York, who was in charge of the bill:

Would it not be a simple matter to provide by amendment that no subsidy of any kind or character shall be paid to any shipping line or shipping concern which has entered into an arrangement to destroy any other American line? *Id.* 9922.

Senator Copeland undertook to "consult the experts and see if they can choose language to cover what the Senator has in mind." *Id.* The next day Senator O'Mahoney offered as an amendment what became §810. After referring to the evil "of paying a subsidy to an American line which was in truth and fact engaged in a conspiracy with foreign lines to discriminate against another American line," he stated, more broadly, that the amendment would "make it clear to

the [United States Maritime] Commission that it is the intention of Congress not to pay subsidies of any kind to any American line which is willing to enter into any combination with other lines, including those operating under foreign flags, to crush American competition."⁵ He added:

In order to give an opportunity to those who may be injured by illegal combinations of the kind I have described to protect themselves I have incorporated in this amendment the principle of section 4 of the Clayton Act which permits the victim of such unfair practices to sue for treble damages.

Senator Copeland made no objection and the amendment was adopted. 80 Cong. Rec. 10075-76 (1936).

The legislative history demonstrates that termination of subsidies was not designed to be a purely penal measure, although quite likely the punitive effect was considered a desirable byproduct. The primary concern manifested was with the added burden which subsidies impose on the competitive position of the victim. We think this concern also extends to the interest of a former victim in the recovery of subsidies improperly paid in the past to lines which are still his competitors, although here the duty of the Administrator may be less absolute than in the obligation to cease payments to current violators. In the nature of things, few complaints of violations will be received and acted on until after some further payments have already been made. Recovery of such payments imposes an added cost on the violators and thus will partially make up to the victim for the burden which the earlier payments indirectly imposed

⁵ Apart from the language of §810 itself, this statement answers defendants' contention that the statute is inapplicable here because AGAFBO was composed solely of American lines.

on him.⁶ Although the statute does not expressly authorize the Maritime Administrator to recover subsidies improperly paid in the past, common law principles would permit this under the subsidy contract in the absence of a statutory prohibition, and we find no such prohibition here. On the other hand, we do not believe that §S10 protects the interest of a carrier in having former violators barred from ever receiving subsidy payments despite their return to the paths of virtue. In fact, we do not think §S10 even authorizes the Administrator to take such a step. So far as concerns payments, as distinguished from recoveries, the statute is mandatory where applicable, contrast §§606(1), 806(c), 46 U.S.C. §1176(1), 1228, and perpetual debarment would be an exceedingly harsh result, which might fatally interfere with the general policy of the Act to foster the development of the American merchant marine.

Construing the statute as we do, we think Sapphire has standing to question the Administrator's failure to seek recovery of the subsidies paid during the period of violation. Since we find that §S10 was designed to promote the competitive interest of a victim by authorizing the recovery of subsidies improperly paid in the past, it follows that this interest is legally protected, see *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 5-7 (1968), and that disregard of it is a "legal wrong" within the meaning of §10(a) of the Administrative Procedure Act, 5 U.S.C. §701. While Sapphire is not presently competing with the AGAFBO lines, we deem that irrelevant in the circumstances of this case.

⁶ The district court thought that withdrawal of the subsidies was unrelated to the competitive interest of the injured line since other innocent lines could at once be admitted to the routes and subsidized. Apart from the question whether any such lines are waiting in the wings, Congress felt that subsidy payments to violators did affect the competitive position of the victim and we see no reason why we should or could reject that conclusion.

Sapphire was forced out of business by the violation of §810, and plaintiff Safir stated in an affidavit that he desired to return to the shipping business as soon as possible. Without deciding whether a potential competitor or a former victim who has washed his hands of the business would have an interest protected by §810, we hold that an interruption of operations like that here does not sufficiently alter the victim's interest to take it out of the protection of §810 with regard to raising the issue of the Administrator's refusal to seek recovery of past payments.⁷

The Government contends that even if plaintiffs have standing, the Administrator's failure to act is a matter within his sole discretion and therefore neither reviewable under §10 of the APA, 5 U.S.C. §701(a)(2), nor the proper subject of an order in the nature of mandamus, cf. 28 U.S.C. §1361.⁸ The arguments come to the same thing and we reject them both. While the Maritime Administrator may have some discretion in connection with the recovery of past subsidies as distinguished from payments to current

7 28 U.S.C. §1361 speaks of "a duty to the plaintiff" rather than of a "legal wrong." The quoted language, proposed by the Department of Justice, was accepted by the sponsors of the legislation as incorporating the law on the availability of mandamus. We think that under a rational law of mandamus such an order is available to anyone entitled to review under §10(a) of the APA and seeking affirmative official action. See generally Byse & Fiocca, *supra*, note 3, 81 Harv. L. Rev. at 316, 320.

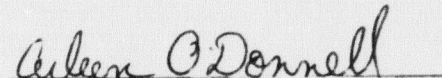
8 The Government also argues that the district court was correct in finding that the provision of a private treble damage remedy created a strong implication that the statute authorized no further relief to a citizen. We disagree. The grant to private citizens of a remedy that would not exist in the absence of specific authorization in no way precludes the availability of further relief consistent with the statutory scheme. Even if the victim is successful in a treble damage suit against the violators, his recovery does not correct the evil at which §810 was aimed, namely, that public moneys have been used to assist some citizens to hurt others in a manner inimical to the interest of the United States.

violators, the discretion is not unlimited. Cf. *American Mail Line, Ltd. v. Gulick*, 411 F. 2d 696 (D.C. Cir. 1969); *Moore-McCormack Lines, Inc. v. U. S.*, 38 U.S.L.W. 2112 (Ct. Cl. July 16, 1969). Specifically, he may not refuse to proceed against the AGAFBO lines without at least considering the interest of the victim, about which Congress was so concerned. There may be other limits on his discretion, but we need not decide this now. If plaintiffs' allegations are true, the Maritime Administration was at least required to make a considered decision whether to recover the subsidies paid in the past. An answer will reveal whether it has done this and, if so, whether on grounds consistent with the statute. For the present we ask only that the Maritime Administration give clear indication that it has properly exercised the discretion with which Congress has endowed it. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941).

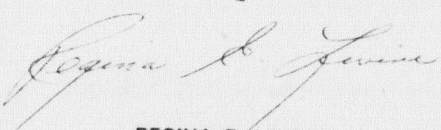
The order dismissing the complaint for failure to state a claim on which relief can be granted is reversed and the cause is remanded for further proceedings consistent with this opinion.

CERTIFICATE OF SERVICE

I Arleen O'Donnell hereby certify that I have this 11th day of July, 1978, mailed by first class pre-paid postage a copy of this Petition for Rehearin in Banc to all counsel of record in this proceeding.


ARLEEN O'DONNELL

DATED: This 11th day of
July, 1978.


REGINA E. LEVINE
Notary Public, State of New York
No. 24-4615276
Qualified in Kings County
Commission Expires March 30, 1979